UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

UNITED STATES OF AMERICA,	)	Case No. 1:04-CV-689
	)	
Plaintiff,	)	Criminal No. 1:02-CR-22
	)	
	)	Chief Judge Beckwith
V.	)	
	)	
	)	
	)	
SAMUEL A. ASHLEY JR.,	)	
	)	
Defendant.	)	
	)	
	)	

MOTION TO RECONSIDER OTHER CLAIMS FOR THE COA THAT THIS COURT HAS ALREADY ISSUED

Now comes the defendant, Sam Ashley, pro se, who respectfully requests that this Honorable Court reconsider adding a few more of the defendant's claims to his Certificate Of Appealability (hereinafter COA) that this Honorable Court has already approved.

Factual History

On October 5, 2004, the defendant filed a timely motion under **Title 28 U.S.C. §2255.** On January 9, 2006, this Honorable Court denied the petition but issued a COA with respect to Petitioner's claim of ineffective assistance of counsel **(B)(1)(a) and (b), (2) & (3) only.** See, Judgement, filed January 9, 2006.

While the defendant is very appreciative of the COA, he requests that a few more of his claims also be granted a COA. That is the purpose of this motion, to ask the court to reconsider other claims that were made in his **§2255.**

The first claim is two-fold, (see this Court's judgment page 24 No.4). Those two claims deal directly with the loss amount which has been the very bedrock of the defendant's appeals, first that counsel failed to file for discovery and secondly, counsel failed to utilize the services of a court appointed Certified Public Accountant (hereinafter CPA). If the defendant could just prove that at least Sixty Five Thousand Two Hundred Nineteen Dollars and Sixty Three Cents was calculated wrong by the government, then the sentence that the defendant received would be reduced by two levels, a substantial time cut in prison time for the defendant.

The defendant requested that a CPA be appointed by the court, the court granted the motion, however, counsel never utilized the CPA's services to aid in disputing the loss amount with the government.

In this court's order of January 9, 2006, (hereinafter Judgment) on page 25, this court states:

> However, his own rambling explanation of the gaps in the calculation by the government and the probation department, when comprehensible, only supports the pre sentence report.

Again, on page 28, of the Judgment this court continues by saying:

> Stating that it is impossible does not make it so, nor is it a substitute for hard evidence. Petitioner does not, nor can he, seriously dispute the total bank deposits of $2,224,970.14 the chart. Petitioner does not deny that both he and his co-defendant estimated that 80% of the total receipts were diverted for his personal use amounting to $1,779,976.11.

This court is aware that the defendant has disputed these figures from the very first day of this case. This court has misread or misunderstood something that is very important. See, Defendant's **$2255, Exhibit I Page 22, Line 18:**

Court Speaking: Allright, so what your leaving to work out with the probation officer, I take it is the amount?

Mr. Aubin: It is the amount your honor, both parties believe that would be a subject for the PSI Report rather than a plea of guilty today.

The above exchange took place during the change of plea hearing, long before the PSI was even started.

Further, see, Doc No. 50 at 20-24, again, the defendant disputes the total loss amount. For this court to suggest that the defendant cannot dispute the amounts is not correct. Saying that the defendant cannot prove it is false, if counsel would have **used the CPA that was appointed or if this court would have approved the defendant's motion for discovery, the proof would be there.** Again, the defendant is being punished for the acts and omissions of counsel for not utilizing the court appointed CPA. For this court to deny all motions for discovery, then tell the defendant that he cannot prove the loss amount to be wrong, is fundamentally wrong and unfair as this court, and counsel have both stopped the defendant from proving the loss amount was lower.

For the purpose of this motion, the defendant submits that the loss amount has always been disputed by the defendant, and by this court refusing to grant him discovery, has prevented him from proving his claim. Everyone wants proof, but nobody lets the defendant have a chance to prove it.

Further, the government simply added up all of the deposits that went into numerous company accounts, by simply adding up all of the deposits that were

made into these accounts gives a false total. Here is a list of the accounts the government used in order to arrive at their false total.

1. Huntington Business Account
2. Huntington Payroll Account
3. North Side Business Account
4. North Side Payroll Account
5. Provident Business Account
6. Provident Payroll Account
7. Bank One Business Account
8. La'Salle Business Account (Chicago)

What happens is that the money gets deposited into the business account, then by using a check, money is transferred into the payroll account. If the daily total was for $1000, that went into the business acount, then a check for perhaps $500 drawn on that account is written and deposited into the payroll account, then the government comes along and just adds up the total deposits, counting the same money twice. If the government wants this court to uphold a sentence that was increased by 16 levels based upon mis-information then again the constitutional rights of the defendant has again been violated.

Shortly after the pre sentence report had been compiled using this false information against the defendant, the defendant wrote a letter to the District Court Judge asking that he be allowed to withdraw his plea. **See, Exhibit H ($2255) last line of that letter states:**

> The main reason for my change of plea is that I am truly not guilty of mail fraud over $1,000,000.

See, **Exhibit A ($2255) Page 12 Line 20:**

> Asst. U.S. Attorney Speaking: In addition, Mr. Ashley did not claim that he did not commit the crime when he was here for his plea. What he claimed was that he didn't take as much money as the government said he took.

See, Judgment, Page 29:

> "However, he does not distinguish unreported income from reported income."

The defendant respectfully begs this court's pardon, he thought that this court was aware that he did not have any reported income, it was all unreported, thus making all of his income "unreported", in reality, there is no difference between the reported income and the unreported income, it should all be the same. For sentencing purposes, the defendant should not have been sentenced for a loss amount of over $1,000,000. If he stole over one million dollars, then certainly his unreported income would be at least one million dollars, but it is not. Again, the defendant submits that the loss calculation used by the district court was/is incorrect and that a two level reduction is called for.

The court continues the pro se defendant bashing, see, Judgment page 29:

> "Petitioner's arguments are "sound and fury signifying nothing." (Court's footnote credits **William Shakespeare, The Tragedy of Macbeth, Act V, Scene 5, (1623) for that statement.)**
>
> The complaints are unsupported by any evidence, or even cogent argument. Petitioner has made **NO** effort other than his own comments, to show any irregularity in the presentence report's financial calculation,"

The defendant wonders if we are all talking about the same case, for this court to say "the petitioner has made **NO** effort other than his own comments" is totally unbelievable. Here is a list of times the petitioner tried to raise this issue, and disputed the figures.

1. Change of plea hearing
2. Withdrawal of guilty plea
3. Objection to the PSI report.

4. Sentencing
5. Direct Appeal
6. First motion for discovery
7. Second Motion for discovery
8. §2255

Further, see, judgment Page 29:

> Additionally, Petitioner wholly ignores the terms of his plea agreement and the statement of facts that was incorperated into it. The plea agreement states that "[t]he amount of loss for purposes of Section 2B1.1 is over one million dollars. **Doc No. 24 at 2**
>
> Petitioner concurred in Mr. Claytor's summary of the plea agreement without any objection. Id at 19.
>
> Thereafter, Special Agent Voorhees of the IRS Criminal Investigation Section provided the court with a reading of the agreed statement of facts in which he stated that "[t]he amount of funds taken by Mr. Ashley under false pretenses and used by him to support his lifestyle was over $1,000,000" Id at 21-22.
>
> Thereafter, the following exchange occurred:
>
> The Court: Mr. Ashley, let me ask you, did you hear what the agent just said?
>
> The Defendant: Yes
>
> The Court: Is what he said correct?
>
> The Defendant: For the purposes of this hearing, it's in my best interest to accept those facts.
>
> Mr. Aubin: That is correct your honor. Mr. Ashley is admitting to those facts for the purpose of this hearing, as I said previously. There are certain arguments that could be made as part of the PSI report, but they do not go to the actual plea of guilty today.
>
> The Court: All right. So what you're leaving to work out with the probation officer, I take it, is the amount?
>
> Mr. Aubin: It is the amount your honor.

Regardless of what the plea agreement stated, the defendant numerous times did not agree with the loss amount. You cannot tell the defendant that he will have a chance to prove to the probation officer the loss amount, and then regardless of what the results are, say well it was in the plea agreement. Yes, it was in the plea agreement, but it is also on record that both parties knew that the amount was being disputed. By having the government try to hold the defendant to the plea agreement as to the loss amount, when everyone knew it was disputed is nothing more than another bad faith act on the government.

Lastly, the prejudice to the defendant concerning this matter is that the Court of Appeals states:

> "[t]he district court had before it uncontradicted evidence from an Internal Revenue auditior, bank records, and statements from Ashley himself..... he is completely unable to rebut this figure even with the aid of a court-appointed accountant. See, **United States V. Ashley, No. 03-3502, 2004 WL 540469 at *5.**

The appeals court used the court appointed accountant against the defendant in this case. The accountant never aided anyone other than the government.

For all of the reasons above, the defendant respectfully requests that this honorable court issue a COA on Issue 4 in this Court's judgment, specifically, defense counsel failed to file for discovery, failed to properly utilize court appointed certified accountant. The defendant has shown the violation of his constitutional rights with regards to this claim , and a COA should issue in this claim.

RESPECTFULLY SUBMITTED

Samuel A. Ashley #40656-061
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CERTIFICATION

I do hereby certify that a copy of this motion has been sent to the Asst. US Attorney at 221 E. Fourth St. Suite 400 Cincinnati OH 45202, by depositing it the Inmate Legal Mail System at FCI Ashland KY, on this 18th day of February 2006.